IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

THOMAS STURM,

Petitioner,

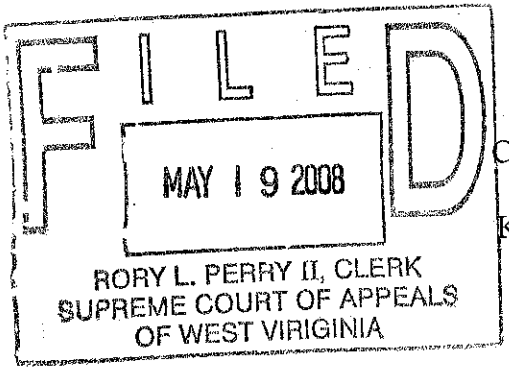
v. **Supreme Court No. 33854**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

APPELLEE'S BRIEF

From the Circuit Court of Kanawha County, West Virginia
Civil Action No. 06-C-617
The Honorable Tod Kaufman



Charles R. Bailey, Esquire (WV Bar No. 0202)
Vaughn T. Sizemore (WV Bar No. 8231)
Kelly C. Morgan, Esquire (WV Bar No. 9519)
BAILEY & WYANT, P.L.L.C.
500 Virginia Street, East
Suite 600 United Center (25301)
Post Office Box 3710
Charleston, West Virginia 25337-3710
(304) 345-4222

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

West Virginia Cases

Cases within Other Jurisdictions

Federal Statutes

West Virginia Statutes

West Virginia Regulations

West Virginia Rules

Other Sources

I. INTRODUCTION

The trial court granted the Board of Education's Renewed Motion to Dismiss because Appellant failed to exhaust his administrative remedies available to him or his parents (hereinafter referred to as "him") while a student of Kanawha County Schools. The Individuals with Disability Education Act ("IDEA") and the state counterpart §126 C.S.R. 16, the Regulations for the Education of Students with Exceptionalities ("Policy 2419") are specifically designed to remedy educational deficiencies. The goal of Policy 2419 and its federal counterpart, the IDEA, is to provide a student with a free appropriate public education (FAPE) through the Individualized Educational Plan (IEP). 20 U.S.C. §1412(a)(4).

Appellant's primary argument is that he was exempt from exhausting any available administrative remedies because it would have been futile. How can the Appellant argue that exhaustion of administrative remedies were futile when they remained available to him throughout his scholastic career with Kanawha County Schools, but never exercised them? Had Appellant followed the procedure as provided by the IDEA and Policy 2419, he could have been awarded additional compensatory educational services or other services up to the age of twenty-one.

Policy 2419 also provides that Appellant could have filed a due process complaint within two years after he graduated on the basis that the services identified in his IEP were not provided. When Appellant filed his Complaint, this administrative remedy was still available to him. Appellant, however, chose to proceed with filing his civil action without exercising his due process rights and failing to exhaust his administrative remedies, as required by West Virginia law through Policy 2419.

Appellant's appeal is based on arguments raised for the first time on appeal that do not even remotely resemble the allegations in Plaintiff's Complaint. For instance, this appeal is the first time

that Appellant alleges that seeking administrative remedies would be futile.[1] Appellant attempts to bypass the mandatory administrative procedures set forth under the IDEA and Policy 2419, requiring that he exhaust available administrative remedies prior to filing suit. The Appellant had actual knowledge of his rights and obligations under Policy 2419 and the IDEA. The Appellant cannot raise new arguments on appeal which were neither pled in his Complaint, nor raised before Judge Kaufman.[2]

Appellant must not be permitted to raise new arguments to this Court on appeal which were not pled in his Complaint. First, it deprives the trial court the right to address the issue based on a record that could have been developed from the due process hearing. Second, it deprives the Appellee the opportunity to defend against alleged educational deficiencies. Furthermore, Appellant never moved the trial court for leave to amend his Complaint to raise the argument that either exhausting available administrative remedies were futile or that no administrative remedies were available to him. Even if these issues were properly before this Court, both arguments still fail because there were adequate administrative remedies available to Appellant and his parents pursuant to Policy 2419 prior to filing this suit.

Appellant does not state a cause of action based on his Complaint under the *West Virginia Human Rights Act*. Even if the Appellant could have stated some claim under the *West Virginia Human Rights Act*, Appellant was first required to exhaust his administrative remedies. Policy 2419 provides remedies for alleged educational deficiencies or that the services provided are inadequate.

---

[1] As will be discussed later, the Appellant bears the burden of proving that exhaustion of his administrative remedies would be futile. By failing to raise this issue before the Circuit Court, he failed to meet his burden. Further, his failure deprived this Court of an administrative and judicial record that would have been established had he exercised his administrative remedies.

[2] Appellant never raised these arguments to the Federal Court in response to Kanawha County Board of Education's Motion to Dismiss because the motion based on his failed to exhaust his administrative remedies under the IDEA.

Appellant is not alleging that he was discriminated against based upon his disability, but that he was denied a free appropriate public education ("FAPE") and seeks relief under the *West Virginia Human Rights Act*. Similarly, *West Virginia Code* §18-1-4 only sets forth specific educational goals. It does not establish cause of action. Disputes regarding the delivery of educational services are to be resolved by Policy 2419 subject to district or circuit court review after an administrative hearing on the record. Therefore, there are no remaining state law claims to analyze because there is no cause of action for a failure to provide FAPE under the *West Virginia Human Rights Act* or *West Virginia Code* §18-1-4.

Moreover, the circuit court lacks subject matter jurisdiction over the dispute once it was remanded back to state court by the United States District Court. The question of whether a court has subject matter jurisdiction over an issue is a question of law which may be raised at any point in the proceedings. Even though the Appellee requested the trial court to dismiss the Plaintiff's Complaint pursuant to Rule 12(b)(6), the Appellee could have also requested the trial court to dismiss the Plaintiff's Complaint pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction because Appellant failed to exhaust his administrative remedies pursuant to Policy 2419.

Appellant argues that the trial court erred in granting the Appellee's Renewed Motion to Dismiss by considering findings from the Federal Court and converting the motion to dismiss into a motion for summary judgment. This argument is also flawed for several reasons. First, converting the Motion to Dismiss into a Motion for Summary Judgment is not reflected on the face of the Order. Second, the Order sets forth procedural facts, it only relies on facts plead within the Complaint. Specifically, Paragraph 1 of the Findings of Fact only recites allegations set forth in Appellant's Complaint. Paragraphs 2 and 3 of the Findings of Fact set forth only procedural facts, not disputed facts with regard to the Appellant's educational services provided by the Kanawha County Schools. Third, even if the trial court had relied on the Federal Court's findings, it had the authority to take

judicial notice of the Order entered by the District Court for the Southern District of West Virginia without converting the Renewed Motion to Dismiss to a Motion for Summary Judgment. The Appellant did not appeal Judge Faber's Order dismissing all of the federal claims.

The circuit court correctly granted the Appellee's Renewed Motion to Dismiss dismissing all remaining state law claims based on the Appellant's failure to exhaust administrative remedies pursuant to West Virginia law. Appellant is therefore unable to meet the burden of proving that the circuit court erred in granting the Appellee's Renewed Motion to Dismiss. Therefore, this Court should affirm Judge Kaufman's order.

II. STANDARD OF REVIEW

"Appellate review of a circuit court's order granting a motion to dismiss a complaint is de novo." Syl. pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 461 S.E.2d 516 (1995). Although a motion to dismiss is viewed with disfavor, if a Appellant's complaint states no cause of action upon which relief might be granted, then the motion to dismiss should be granted. *See Fass v. Nowsco Well Services, Ltd.*, 350 S.E.2d 562, 564 (1986). As for the burden of proof on an appeal, the Court has noted, "An appellant must carry the burden of showing error in the judgment of which he complains." Syl. pt. 2, *West Virginia Department of Health & Human Resources Employees Federal Credit Union v. Tennant*, 599 S.E.2d 810 (2004). With respect to reversing a judgment of a trial court, the Court has proclaimed, "This Court will not reverse the judgment of a trial court unless error affirmatively appears from the record . . . Error will not be presumed, all presumptions being in favor of the correctness of the judgment." *Id.* A trial court has the authority to take judicial notice of facts set forth in orders of other courts without converting a Motion to Dismiss to a Motion for Summary Judgment. See *Gulas v. Infocision Management Corp.*, 215 W.Va. 225, 229, 599 S.E.2d 648, 652

(2004)(citing *Andrews v. Daw*, 201 F.3d 521 (4th Cir.2000)).[3] Considering matters outside the Complaint when determining whether a court has subject matter jurisdiction never converts the motion from a motion to dismiss to a motion for summary judgment. *Elmore v. Triad Hospitals, Inc.*, 220 W.Va. 154, 158, 640 S.E.2d 217, 221 (2006).

III. STATEMENT OF CASE

a. NATURE OF PROCEEDING AND RULING BELOW

Appellant filed this action in Kanawha County on April 4, 2006, alleging violations of the *Individuals with Disabilities Education Act*, Section 504 of the *Rehabilitation Act of 1974, Americans with Disabilities Act*, Section 1983 of the *Civil Rights Act, the West Virginia Human Rights Act*, and *West Virginia Code* §18-1-4.[4] Appellant sought compensatory damages to cover his past present and future education and expenses, loss of enjoyment of life, loss of future earnings, annoyance, inconvenience and emotional distress, and punitive damages.[5] The IDEA and Policy 2419, however, only provide for compensatory educational services and other services such as vocational and rehabilitation services, not monetary damages. See 20 U.S.C.A. §1415 and §126 C.S.R. 16. Further, Appellant has not alleged that he has suffered any personal or bodily injuries.

The Appellee removed this case to federal court based on the federal court's concurrent jurisdiction with the state court because of Appellant's specific allegations of statutory violations under the IDEA. The Appellee filed a Motion to Dismiss because Appellant failed to exhaust his

---

[3] Judge Kaufman's Order did not take judicial notice of any facts outside of the Plaintiff's Complaint. Other than mere recitals of Appellant's allegations, Judge Kaufman only refers to procedural facts.

[4] The Appellant was nineteen at the time he filed his Complaint in Circuit Court. The Appellant is currently twenty-two years old.

[5] W.Va. Code § 29-12A-7 prohibits punitive damages against political subdivisions like the Appellee. As such, the circuit court was correct in dismissing these claims.

administrative remedies available under the IDEA. Judge Faber agreed and ruled that Appellant failed to exhaust his administrative remedies under the IDEA prior to filing this action, ordering the dismissal of all claims under the *Individuals with Disabilities Education Act*, Section 504 of the *Rehabilitation Act of 1974, Americans with Disabilities Act*, and Section 1983 of the *Civil Rights Act*, and remanded the remaining state law claims back to circuit court.[6] *See Judge Faber's Memorandum and Opinion. See also Sturm v. Board of Educ. of Kanawha County*, WV, Slip Copy, 2006 WL 1582359, June 01, 2006 (S.D.W.Va. 2006). Upon remand, the Defendant filed a Renewed Motion to Dismiss requesting the trial court to dismiss the remaining state law claims. Judge Kaufman ruled that the Plaintiff could not maintain his state law claims because he failed to exhaust the administrative remedies under the State law Implementing the IDEA, §126 C.S.R. 16 (Policy 2419). *See Judge Kaufman's Order Granting Renewed Motion to Dismiss*. The trial court was absolutely correct when it dismissed Appellant's remaining state law claims for failure to state a cause of action for which relief could be granted.[7]

A party may only file a civil action after he files a due process complaint. §126 C.S.R. 16-11(3)(A). After a hearing examiner conducts an impartial hearing and fully develops the records, a hearing examiner will issue a decision. §126 C.S.R. 16-11(3)(M). If any party is displeased with the decision a civil action may be filed, challenging the decision with the court. §126 C.S.R. 16-11(3)(N). The court is provided the record, may take additional evidence, and may provide the appropriate relief. *Id.* Policy 2419 does not permit a party to file a civil action without first exhausting the specific

---

[6] In Paragraph 6 of the Conclusions of Law in the Order Granting the Appellee's Renewed Motion to Dismiss, Judge Kaufman properly ruled that no remaining state law claims existed as a matter of law because Appellant failed to exhaust his administrative remedies prior to filing suit, pursuant to Policy 2419.

[7] As shown under "The Standard for a Motion to Dismiss" the Circuit Court could have dismissed the remaining state law claims on the basis of a lack of subject matter jurisdiction.

procedure designed to remedy educational deficiencies. §126 C.S.R. 16-11(3).

b. STATEMENT OF FACTS

Thomas Sturm attended the public schools of West Virginia (Pl. Comp. ¶2) and graduated from Sissonville High School in May 2004 (Pl. Comp. ¶6). Mr. Sturm entered elementary school under an OHI (Other Health Impaired) Program and received special instruction beginning in the first grade (Pl. Comp. ¶7). He has been diagnosed with and has received medical treatment for Attention Deficit Hyperactive Disorder since 1993 (Pl. Comp. ¶8). Appellant alleges that his IQ is in the low average range of intellectual ability, verbal ability, and non-verbal tasks, which required him to participate in special education classes (Pl. Comp. ¶9). In 1999, he was diagnosed with depressive disorder and was hospitalized as a result of suicidal ideations (Pl. Comp. ¶10).

Appellant alleges that each of his IEP's identified the same goals. (Pl. Comp. ¶12). Appellant attended Ben Franklin Career Center as part of his IEP, but was not permitted to return after being expelled for having a knife on school property (Pl. Comp. ¶16). Prior to graduation, Appellant filed for Social Security Income benefits, which were awarded on July 29, 2005, after findings that revealed he was functionally illiterate, unable to perform activities within a schedule, unable to maintain regular attendance, and had no vocationally past relevant work history (Pl. Comp. ¶19).

Appellant's Brief lists a statement of facts for each of the claims in his Brief. Many of these facts are not relevant to the basis relied upon by the circuit court in granting the Appellee's Renewed Motion to Dismiss. "For purposes of ruling on a Rule 12(b)(6) motion to dismiss, the facts as set out in the plaintiff's complaint are deemed to be true." *Whitehair v. Highland Memory Gardens, Inc.*, 174 W.Va. 458,459, 327 S.E.2d 438,439 (1985)(citing *Sticklen v. Kittle*, W.Va., 287 S.E.2d 148, 157 (1981); *Mandolidis v. Elkins Indus., Inc.*, 161 W.Va. 695, 717, 246 S.E.2d 907, 920 (1978); *John W. Lodge Distrib. Co. v. Texaco, Inc.*, 161 W.Va. 603, 605, 245 S.E.2d 157, 158 (1978)). Allegations

which are made beyond the allegations set forth in the Complaint are not presumed to be true. The Court is not obligated to accept as being true any allegations or legal conclusions contained in Appellant's brief which go beyond the allegations contained in his Complaint. See *Collins v. Red Roof Inns, Inc.*, 248 F.Supp.2d 512, 515-516 (S.D.W.Va. 2003). Appellant failed to plead any "facts" for which the trial court could provide him relief either under Rule 12(b)(1) or Rule 12(b)(6).

c. THE STANDARD FOR A MOTION TO DISMISS

"Appellate review of a circuit court's order granting a motion to dismiss a complaint is de novo." Syllabus Point 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995). A motion to dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is a means of testing the formal sufficiency of a complaint. *See Collia v. McJunkin*, 178 W.Va. 158, 358 S.E.2d 242 (1987), *cert. denied*, 484 U.S. 944, 108 S.Ct. 303 (1987); *Mandolitis v. Elkins Industries, Inc.*, 161 W.Va. 695, 717, 246 S.E.2d 907, 920 (1978)(superseded in part by statute *see Gallapoo v. WalMart Stores*, 197 W. Va. 172, 475 S.E.2d 172 (1996)). A motion to dismiss enables a court to weed out unfounded suits. *Harrison v. Davis*, 197 W.Va. 651, 478 S.E.2d 104 (1996). The primary purpose of a motion to dismiss is to seek a determination of whether the plaintiff is entitled to offer evidence in support of the claims made in the complaint. *Dimon v. Mansey*, 177 W.Va. 50, 52, 479 S.E.2d 339 (1996). Although a motion to dismiss for failure to state a claim is viewed with disfavor, if a plaintiff's complaint states no cause of action upon which relief might be granted, then the defendants' motion to dismiss should be granted. *See Fass v. Nowsco Well Services, Ltd.*, 350 S.E.2d 562, 564 (1986). Essential material facts must appear on the face of the complaint. *Id.* The complaint must set forth enough information to outline the elements of a claim or permit inferences to be drawn that these elements exist. *Id* (citing *Jenkins v. McKeithen*, 395 U.S. 411, 423-24, 89 S.Ct. 1843, 1849-50, 23 L.Ed.2d 404, 417-18 (1969) and W.Va.R.Civ.P. 8(a)).

While the factual allegations are to be accepted as true in considering a motion to dismiss, the court need not accept unsupported legal conclusions, legal conclusions couched as factual allegations, or conclusory factual allegations devoid of any reference to actual events. *Collins v. Red Roof Inns, Inc.*, 248 F.Supp.2d 512, 515-516 (S.D.W.Va. 2003); *Eastern Shore Mkts., Inc. v. J.D. Assocs. Ltd. P'ship*, 213 F.3d 175, 180 (4th Cir. 2000). "The inclusion of conclusory legal terms, however, does not insulate a complaint from dismissal under Rule 12(b)(6) when the facts alleged in the complaint do not support the legal conclusion." *Trigon Ins. Co. v. Columbia Naples Capital, LLC*, 235 F.Supp.2d 495, 500 (E.D.Va.2002)(quoting *Randall v. U.S.*, 30 F.3d 518, 522 (4th Cir.1994); citing *Trulock v. Freeh*, 275 F.3d 391, 405 (4th Cir.2001)).

Appellee's Renewed Motion to Dismiss was made pursuant to Rule 12(b)(6) for failure to state a cause of action. The trial court could, however, have dismissed Appellant's Complaint under 12(b)(1) for lack of subject matter jurisdiction. *See MM ex rel. DM v. School Dist. of Greenville County*, 303 F.3d 523, 536 (4th Cir.2002) and *Barnes v. International Amateur Athletic Federation*, 862 F.Supp. 1537 (S.D.W.Va.,1993)(The plaintiff is required to have exhausted his available administrative remedies before seeking judicial review and his failure to do so deprives the court of subject matter jurisdiction.) The question of whether a court has subject matter jurisdiction over an issue is a question of law which may be raised at any point in the proceedings. See Syllabus Point 1, *Hinkle v. Bauer Lumber & Home Bldg. Center, Inc.*, 158 W.Va. 492, 211 S.E.2d 705 (1975) ("Whenever it is determined that a court has no jurisdiction to entertain the subject matter of a civil action, the forum court must take no further action in the case other than to dismiss it from the docket."). Therefore, to the extent not raised before, the Appellee states that the circuit court lacked subjected matter jurisdiction because of Appellant's failure to exhaust his administrative remedies.

IV. STATEMENT OF LAW AND ARGUMENT

A. The Individuals with Disabilities Education Act (IDEA) and §126 C.S.R. 16, West Virginia Education of Students with Exceptionalities (Policy 2419) provide for administrative remedies to cure any educational deficiencies.

A brief history underlying the IDEA is helpful before analyzing what administrative remedies were available to Appellant. Appellant's allegation that he did not receive a free appropriate education arises under the *Individuals with Disabilities Education Act,* which provides that children with disabilities are entitled to FAPE. 20 U.S.C.A. §1400, *et seq*. FAPE is statutorily defined as:

> [S]pecial education and related services that-
> (A) have been provided at public expense, under public supervision and direction, and without charge;
> (B) meet the standards of the State educational agency;
> (C) include an appropriate public preschool, elementary, or secondary school education in the State involved; and
> (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. § 1401(8).

In *Board of Educ. of Hendrick Hudson Central School Dist., Westchester County v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982), the Court analyzed a similar statute, Education for All Handicapped Children, holding that a free appropriate public education did not require the state to maximize the full potential of each handicapped child commensurate with the opportunity provided to nonhandicapped children. The Court further held:

> "Assuming that the Act was designed to fill the need identified in the House Report-that is, to provide a 'basic floor of opportunity' consistent with equal protection-neither the Act nor its history persuasively demonstrates that Congress thought that equal protection required anything more than equal access. Therefore, Congress' desire to provide specialized educational services, even in furtherance of "equality," cannot be read as imposing any particular substantive educational standard upon the States."

Since *Rowley* was decided, it has been cited more than five thousand times by courts at all

levels. Although *Rowley* was decided under Education for All Handicapped Children, the definition of a FAPE outlined by the Court is the standard under which the IDEA is measured. See *A.K. ex rel. J.K. v. Alexandria City School Bd.*,484 F.3d 672 (4th Cir 2007). In addition to being the standard under which federal courts address the IDEA, many state courts have applied it in defining a FAPE. *See John A. v. Board of Educ. for Howard County*, 400 Md. 363, 929 A.2d 136 (2007)(applying the *Rowley* standard to Maryland law); *A.D. ex rel. L.D. v. Sumner School Dist.*, 140 Wash.App. 579, 166 P.3d 837 (2007)(applying *Rowley* to Washington law); *Stancourt v. Worthington City School Dist. Bd. of Edn.*, 164 Ohio App.3d 184, 841 N.E.2d 812 (2005)(applying *Rowley* to Ohio law); *Fayette County Bd. of Educ. v. M.R.D. ex rel. K.D.*, 158 S.W.3d 195, 197 Ed. Law Rep. 413 (2005)(applying *Rowley* to Kentucky law); *Pawling Cent. School Dist. v. New York State Educ. Dept.*, 3 A.D.3d 821, 771 N.Y.S.2d 572, 185 Ed. Law Rep. 339 (2004)(applying *Rowley* to New York law). Thus, the rationale by the state courts is that the state laws dealing with the education of disabled students were passed to implement the federal IDEA. See 20 U.S.C. 1412(a). W.Va. Code § 18-20-1 authorizes the State Board of Education to create Policy 2419, which is implemented by local county boards of education. In granting this authorization, the Legislature outlined, "The state board shall adopt rules to advance and accomplish this program and to assure that all exceptional children in the state, including children in mental health facilities, residential institutions and private schools, will receive an education in accordance with the mandates of state and federal laws." *Id.* Thus, this Court would assuredly apply *Rowley* to West Virginia law and defining FAPE.

Such is the case with the IDEA because there is no language as to any substantive standard prescribing the level of education to be accorded to disabled children.[8] In *Rowley,* the Court went on to note that a "FAPE "consists of educational instruction specifically designed to meet the unique

[8] The IDEA has undergone several amendments.

needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." *Board of Educ. of Hendrick Hudson Sch. Dist. v. Rowley*, 458 U.S. 176, 188-89 (1982). While a state must provide specialized instruction and related services sufficient to confer some educational benefit upon the handicapped child, the IDEA does not require the furnishing of every special service necessary to maximize each handicapped child's potential. *See County School Bd. of Henrico County, Virginia v. Z.P. ex rel. R.P.*, 399 F.3d 298, 300 (4th Cir.2005) (quoting *MM ex rel. DM v. School Dist.*, 303 F.3d 523, 526-27 (4th Cir.2002) (citations, internal quotation marks, and alterations omitted)).

The IDEA does not accord a party the right to first file suit in federal court to redress the denial of FAPE or other rights protected by IDEA because there is detailed administrative scheme for aggrieved parents to pursue and exhaust prior to filing federal claim. *See Doe v. Alfred*, 906 F.Supp. 1092, 1096-1097 (1995). Instead, the IDEA requires that a parent, on behalf of a child under the age of eighteen, before bringing a suit for violations of the IDEA, to exhaust the administrative remedies and procedural safeguards that have been put into place by the state's agency. *Id.* The IDEA also provides that when a child reaches the age of maturity, all rights accorded to the parents transfer to the child. *See* 20 U.S.C.A. §1415(m). The IDEA specifically states that if the administrative procedures in the IDEA are not exhausted, then a person aggrieved by the process may not maintain actions under the ADA, the *Rehabilitation Act*, or any other laws protecting the rights of children with disabilities. The provision states:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the *Constitution*, the *Americans with Disabilities Act of 1990* [42 U.S.C.A. § 12101 *et seq.*], Title V of the *Rehabilitation Act of 1973* [29 U.S.C.A. § 791 *et seq.*], or other Federal laws protecting the rights of children with disabilities, ***except that before the filing of a civil action under such laws*** seeking relief that is also available under this subchapter, ***the procedures under subsections (f) and (g) of this section shall be exhausted to the same extent as would be required***

had the action been brought under this subchapter.

20 U.S.C.A. §1415(l) (***emphasis*** added).

Further, the IDEA allows any party to challenge a decision of a hearing examiner, by bringing a civil action within 90 days from the date of the decision of the hearing officer. The provision states:

> Any party aggrieved by the findings and decision made under subsection (f) or (k) of this section who does not have the right to an appeal under subsection (g) of this section, and any party aggrieved by the findings and decision made under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy. The party bringing the action shall have 90 days from the date of the decision of the hearing officer to bring such an action, or, if the State has an explicit time limitation for bringing such action under this subchapter, in such time as the State law allows.

20 U.S.C.A. §1415(i)(2)[9].

The State of West Virginia, as it is required to do under the IDEA, has promulgated legislative rules providing for the education of disabled students. Policy 2419 parallels the IDEA and is in conformity with the IDEA. Policy 2419 establishes procedures for addressing disputes about the provision of special education services.[10] *See Footnote 2, State ex rel. Justice v. Board of Education of the County of Monongalia*, 208 W.Va. 270, 539 S.E.2d 777(2000). West Virginia reaffirms the goals of the IDEA and has specific procedures in place to meet the goals of the IDEA. §126 CSR 16 provides:

> The Individuals with Disabilities Education Improvement Act Amendments of 2004, Public Law 108-446, herein after referred to as IDEA 2004 and the IDEA regulations (34 CFR Part 300), require that the State set forth policies and procedures to demonstrate that the State has established a goal of providing full educational opportunity to all students with disabilities who are residents of West Virginia, aged

---

[9] West Virginia allows 120 days within which to file such an action. *See* §126 C.S.R. 16-11(3)(N).

[10] *W.Va. Code* 18-2-5 authorizes the WV Board of Education to adopt these legislatively approved rules to implement the West Virginia Education of Students with Exceptionalities.

> birth through twenty-one years of age and a detailed timetable for accomplishing that goal. The State of West Virginia affirms the goal to provide full educational opportunities by 2014 for all students with disabilities, aged birth through twenty-one years of age, residing within its jurisdiction. The State works toward the realization of this goal through the implementation of, and compliance with, IDEA 2004 and any subsequent reauthorization, state policies and procedures and implementation of the West Virginia Continuous Improvement and Focused Monitoring System (CIFMS). §126 C.S.R. 16-2.1

These regulations provide specific administrative procedures where any parent, adult or student may file a complaint by contacting the district superintendent of the local board of education or the West Virginia Department of Education. §126 C.S.R. 16-11(3)(A). Policy 2419 encourages mediation in attempt to resolve differences relating to the identification, evaluation or educational placement or the provision of FAPE to a student with a disability or an exceptionality. §126 C.S.R. 16-11(2). If the parties are unable to resolve the complaint through mediation, a hearing examiner with specialized education, training and experience relating to special education law is selected. §126 C.S.R. 16-11(3)(G). After conducting the proceedings in a fair and impartial manner, the hearing decision issues a decision. §126 C.S.R. 16-11(3)(M). The hearing is final, unless a party challenges the decision through civil action. *Id.* "Any party aggrieved by the findings and decisions made in a hearing has the right to bring a civil action with respect to the request for a due process hearing through any state court of competent jurisdiction within 120 days of the date of the issuance of the hearing officer's written decision or in a district court of the United States without regard to the amount in controversy." §126 C.S.R. 16-11(3)(N). Once a civil action is filed appealing the hearing examiner's decision, the court shall receive the administrative proceeding records, hear additional evidence, and grant relief that is determined to be appropriate based upon the preponderance of evidence. *Id.* Reasonable attorneys' fees may be awarded to the prevailing party. §126 C.S.R. 16-11(3)(O).

It is undisputed that Appellant violated weapons policy (Pl. Comp. ¶16), as well as the drug and behavior policies. After each of the Appellant's behavior that resulted in a suspension or expulsion, a manifestation hearing was held to determine whether the behavior was the result of the student's disability or not.[11] §126 C.S.R. 16-7 provides that:

> A manifestation determination is required if the district is considering removing a student with a disability from his or her educational placement for disciplinary reasons beyond ten consecutive school days or more than ten consecutive school days when the district deems that a pattern exists. A manifestation determination is defined as a review of the relationship between the student's disability and the behavior subject to the disciplinary action.
> §126 C.S.R. 16-7(2)

If the student's conduct is determined not to be a manifestation of the student's disability, the district must determine the appropriate disciplinary action, which may include relevant disciplinary procedures applicable to students without disabilities. *Id.* If the student's behavior violation involves weapons, illegal drugs or serious bodily injury, the district may remove the student to an interim alternative educational setting for not more than forty-five school days. *Id.* The parent or adult student may request an expedited due process hearing if they disagree with the manifestation determination decision, any decision of the IEP Team regarding change of placement during a disciplinary proceeding or the decision regarding the student's placement in the interim alternative educational setting. §126 C.S.R. 16-7(3). Any decision of the hearing officer in an expedited hearing may be appealed to federal or state district court. *Id.*

Appellant and his parents had an opportunity to file a due process complaint after the development of each and every IEP or manifestation determination because of rule violations, or at

---

[11] Appellant's only disability was a learning disability after being medically treated for ADHD and depressive disorder. The manifestation determination reports reveal that none of the violations by the Appellant of the drug, weapons and behavior policies was a manifestation of Appellant's learning disability.

any time in which the Appellant or his parents believed there was an educational deficiency. Appellant was required to file a due process complaint, proceed through a due process hearing before appealing an adverse decision. Appellant nor his parents, however, never filed a due process complaint at any time. Judge Kaufman appropriately dismissed the remaining state law claims according to West Virginia law.

Moreover, as the party seeking relief in a civil action arising under IDEA, Appellant bears the burden of proof. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). The Fourth Circuit recently noted that

> The district court must give "due weight" to the state administrative proceeding. *See Rowley*, 458 U.S. at 206, 102 S.Ct. 3034; *Doyle v. Arlington County Sch. Bd.*, 953 F.2d 100, 103 (4th Cir.1991) ("Generally, in reviewing state administrative decisions in IDEA cases, courts are required to make an independent decision based on a preponderance of the evidence, while giving due weight to state administrative proceedings.").
>
> We have conceded that the "due weight" to be given the state administrative proceeding requires that findings of fact by the hearing officers in [IDEA] cases ... be considered prima facie correct, akin to the traditional sense of permitting a result to be based on such fact-finding, but not requiring it.
>
> We are further of opinion that when fact-findings are regularly made and entitled to prima facie correctness, the district court, if it is not going to follow them, is required to explain why it does not.... After giving the administrative fact-findings such due weight, if any, the district court then is free to decide the case on the preponderance of the evidence, as required by the statute. *Doyle [*Arlington County Sch. Bd.,], 953 F.2d [100] at 105 [(4th Cir.1991)](citations omitted).

County School Bd. of Henrico County, Virginia v. Z.P. ex rel. R.P., 399 F.3d 298, 306 (4th Cir. 2005). Appellant also has the burden of challenging his IEP. *Weast v. Shaffer*, 377 F3d 499 (4th Cir. 2004). Therefore, the analysis should be done in the converse, i.e., Appellant must show that the IEP is inadequate, rather than the school district proving the IEP is adequate.

This Court has consistently followed federal law that where an administrative remedy is

available, that relief must first be sought from the administrative body and exhausted before a court is permitted to act. "Where an administrative remedy is provided by statute, relief must be sought from the administrative body and such relief must be exhausted before the Court will act." *Daurelle v. Traders Federal Savings and Loan Association*, 143 W. Va. 674 (1958), *Cowie v. Roberts*, 173 W. Va. 64 (1984), *State ex rel Miller v. Reed*, 203 W. Va. 673 (1998), and *Expedited Transportation Systems v. Viewig*, 207 W. Va. 90 (2000).

Appellant, or his parents if he was under the age of eighteen, were required to file a request for a due process hearing. If Appellant had availed himself of this requirement, he may have received compensatory educational services or other services from the hearing examiner. If Appellant was not satisfied with the decision of the hearing examiner, Appellant could have challenged it by filing a civil action in state or federal court. By filing the action, Appellant would have been entitled to present new evidence, in addition to the administrative record. "In any action brought under the above, the court shall receive the records of the administrative proceedings, hear additional evidence at the request of a party, and grant the relief that the court determines to be appropriate based on the preponderance of the evidence." 126 C.S.R.16-11(3)(N).

Neither Appellant nor his parents availed themselves of any of the administrative remedies available to them to dispute the delivery of the educational services provided to Appellant while he was a student. Appellant deliberately avoided the administrative procedures mandated by West Virginia law and ultimately failed to exhaust his administrative remedies to obtain FAPE. Due to that failure, Judge Kaufman properly ruled that Appellant as a matter of law was precluded from asserting his remaining state law claims under the *West Virginia Human Rights Act*, *West Virginia Code* §18-1-4, and his other claims for compensatory and punitive damages.

B. Appellant could have filed a due process complaint pursuant to Policy 2419 within two years after graduation asserting a claim relating to the services provided him under his IEP

Appellant's second Assignment of Error alleges that there were no administrative remedies available to Appellant after he graduated. In essence, Appellant alleges that the Kanawha County Board of Education should not have graduated him in May 2004. Appellant makes the conclusion that since Appellant was no longer eligible for a FAPE, there were no administrative remedies available to him. Policy 2419, however, provides that a parent or adult student may file a due process complaint but "a due process complaint must be initiated within two years of the date the parent/adult student or district knew or should have known of the disputed decision or alleged action that forms the basis for the complaint." §126 C.S.R. 16-11(3)(A). Policy 2419 permits a party to file a complaint with the West Virginia Department of Education and/or the superintendent of the county board of education. §126 C.S.R. 16-11(3)(A).

It is undisputed that County boards of education are required to provide FAPE to students who have not yet reached the age of twenty-one and who have not graduated. Nonetheless, even if a person graduates, a person is not prohibited from initiating an impartial due process hearing on the basis that the services identified in their IEP were not met. §126 C.S.R. 16-1(3). While §126 C.S.R. 16-1(3) provides that the obligation to provide FAPE does not include students who have graduated, §126 C.S.R. 16-11(3) does not limit the due process hearing to those who are only eligible for a Free and Appropriate Public Education. §126 C.S.R. 16-11(3) provides that, "A due process complaint may be filed to resolve disputes on any matter related to the proposal or refusal to initiate or change the identification, evaluation, or educational placement or the provision of FAPE of a public school student." Appellant could have utilized the administrative remedies due to a change in his status e.g. that although he graduated, the services for which he was entitled as provided in his IEP were not

provided or completed.[12]

In this case, Appellant alleges that the Appellee should not have graduated him in May 2004. Appellant, however, could have filed a due process complaint pursuant to Policy 2419, even though he was no longer eligible for FAPE.[13] For example, Appellant have alleged that any services for which he was entitled to as part of his IEP were not properly provided. If Appellant had filed a due process complaint within two years after graduating, he may have received additional services for which he claims he was denied during the time he was a student. It is undisputed that Appellant's IQ is in the low average range of intellectual ability. Obviously due process hearings are designed to identify and resolve these types pf educational issues.

Accordingly, Appellant himself had two years from the date of his graduation to initiate a due process hearing, pursuant to §126 C.S.R. 16-11(3). The only reason that Appellant is now unable to exhaust his administrative remedies, is due solely to his own failure to file a complaint within two years of the disputed decision. In April 2004, at the time of filing this lawsuit, Appellant still had the opportunity to file a due process complaint. Had Appellant exhausted this administrative remedy, pursuant to Policy 2419, a qualified hearing examiner could have properly analyzed any alleged deficiencies in his IEP. In doing so, the hearing examiner would have fully developed the record and made a decision. If Appellant was displeased with the ruling, Appellant could have appealed the decision by filing a civil action. The trial court would have then had an opportunity to

---

[12] In the past, the Appellee has not disputed jurisdiction when a due process complaint was filed within two years after graduation and the alleged deficiency was related to a service that was required by the IEP. For example, a graduate of Kanawha County Schools complained that he was not provided sufficient transitional services, as required by his IEP. In that case, the hearing examiner determined that additional transitional services were required after his graduation.

[13] The administrative remedies could have included compensatory education and services. 126 CSR16. *See also State ex rel. Justice v. Board of Education of the County of Monongalia*, 208 W.Va. 270, 539 S.E.2d 777(2000).

review the record from the hearing examiner. Appellant's own actions were the only reason that exhaustion of administrative remedies available after graduation is now futile. Thus, Judge Kaufman properly granted the Renewed Motion to Dismiss pursuant to West Virginia law.

C. No cause of action exists under the *West Virginia Human Rights Act* or *West Virginia Code* §18-1-4 for denying free appropriate public education

Appellant urges this Court that to remand this case back to circuit court to resolve the remaining state law claims. There are no remaining state law claims to analyze. Appellant does not allege that he was discriminated against based upon his disability. Instead, Appellant alleges that Appellant "discriminated against the Plaintiff under the *West Virginia Human Rights Act* on the basis of disability by denying him a free, appropriate public education." (Pl. Comp. ¶40).

Essential material facts must appear on the face of the complaint. *Fass v. Nowsco Well Service, Ltd.*, 177 W.Va. 50, 350 S.E.2d 562 (1986). The complaint must set forth enough information to outline the elements of a claim or permit inferences to be drawn that these elements exist. *Id* (citing *Jenkins v. McKeithen*, 395 U.S. 411, 423-24, 89 S.Ct. 1843, 1849-50, 23 L.Ed.2d 404, 417-18 (1969) and W.Va.R.Civ.P. 8(a)).

While Appellant does not provide specifically how Appellant was discriminated against, Appellee will assume for purposes of this appeal that Appellant is referring to W.Va. Code § 5-11-9, making it unlawful to discriminate against a person, unless based upon a occupational qualification, or under applicable security regulations:

> (6) For any person being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodations to:
>
> > (A) Refuse, withhold from or deny to any individual because of his or her . . . disability, either directly or indirectly, any of the accommodations, advantages, facilities, privileges or services of the place of public accommodations[.]

Appellant's allegations under the *West Virginia Human Rights Act* are identical to those for violations of the IDEA, Section 504 of the Rehabilitation Act and the ADA. (Pl. Comp. ¶¶ 23, 28 and 33.) While Appellant's Complaint does not specify, it is assumed that the advantage, privilege, or service is a denial of FAPE. The *West Virginia Human Rights Act,* however, does not refer to a FAPE. This is because the requirement to provide FAPE is set forth in the IDEA and Policy 2419. Moreover, the remedies for failure to provide FAPE and educational services are set forth in Policy 2419, the law of this State. Appellant received a FAPE and was provided reasonable accommodations for his learning disability, as outlined in his IEPs. His IEPs were precisely established to provide him with FAPE. Appellant has not been denied any educational services or benefits, or any other advantage, privilege, or service to which Appellant was entitled. Appellant does not have a cause of action under the *West Virginia Human Rights Act.* If Appellant was denied FAPE, Appellant's remedy is provided by the IDEA and Policy 2419, not the *West Virginia Human Rights Act.*

Similarly, there is no cause of action pursuant to *West Virginia Code* §18-1-4. Appellant alleged that *West Virginia Code* §18-1-4 requires the Appellee "to provide to students a free, public education and to prepare them to be gainfully employed and to insure that they are not functionally illiterate." (Pl. Comp. ¶41). *West Virginia Code* §18-1-4[14] did not set forth any specific educational requirements or create a cause of action. Instead, it only expressed "goals" for education. Thus, *West Virginia Code* §18-1-4 does not establish cause of action. Disputes regarding the delivery of educational services are to be resolved by the IDEA and Policy 2419 subject to either the U.S. District Court's or state circuit court's jurisdiction after an administrative hearing.

---

[14] W.Va. Code § 18-1-4 was Amended by 2008 West Virginia Laws Ch. 72 (S.B. 595). However, the discussion in this Brief will discuss the section in effect during the relevant time period.

Appellant's cause of action, if any, is under the IDEA and the state counterpart, Policy 2419, not the *West Virginia Human Rights Act or West Virginia Code* §18-1-4. If there were a separate cause of action under the *West Virginia Human Rights Act* or *West Virginia Code* §18-1-4, the effect would be to bypass and ultimately obliterate the IDEA and Policy 2419. Plaintiffs would no longer need to exhaust their administrative remedies, but skip them to assert separate causes of action under the *West Virginia Human Rights Act* or *West Virginia Code* §18-1-4 where exhaustion is not required before filing suit. Allowing the Appellant to maintain separate causes of action under the West Virginia Human Rights Act or W.Va. Code § 18-1-4 "renders meaningless the IDEA's mandatory and carefully tailored provisions for administrative review." *Doe v. Alfred*, 906 F.Supp. 1092, 1099 (S.D.W.Va. 1995). Likewise, allowing the Appellant to bypass the due-process of law requirements of Policy 2419 would render its carefully tailored provisions for administrative review as meaningless. Thus, if this case were remanded back to the circuit court, there would be no remaining causes of action for Appellant to maintain.

D. Exhaustion of administrative remedies is jurisdictional

(1) Exhaustion of administrative remedies is mandated by both the IDEA and Policy 2419 prior to filing a civil action.

When the legislature provides for an administrative remedy to govern a particular field of endeavor, courts are without jurisdiction to grant relief for any act or omission if such act or omission is within the rules and regulations of the administrative agency involved until the complaining party has exhausted such remedies before the administrative body. *Bank of Wheeling v. Morris Plan Bank & Trust Company*, 155 W.Va. 245, 183 S.E.2d 692 (1971). When a plaintiff fails to exhaust administrative remedies, the typical disposition is a dismissal of the action for lack of subject matter jurisdiction. *See MM ex rel. DM v. School Dist. of Greenville County*, 303 F.3d

523, 536 (4th Cir.2002). As the Court stated in *Lipscomb v. Tucker County Commission*, 197 W.Va. 894, 475 S.E.2d 84, 88 (1996), Appellant was "required to and entitled to exhaust her administrative remedies." Exhaustion of administrative remedies is a jurisdictional prerequisite to resort to the courts. *Daurelle v. Traders Federal Savings and Loan Association*, 143 W. Va. 674 (1958), *Cowie v. Roberts*, 173 W. Va. 64 (1984), *State ex rel Miller v. Reed*, 203 W. Va. 673 (1998), and *Expedited Transportation Systems v. Viewig*, 207 W. Va. 90 (2000).

The rule of exhausting administrative remedies before actions in courts are instituted is applicable "even though the administrative agency cannot award damages[,] if the matter is within the jurisdiction of the agency." Syl. Pt. 4, *State ex rel. Smith v. Thornsbury*, 214 W.Va. 228, 588 S.E.2d 217 (2003). The money damage portion of the suit must also be dismissed until the administrative remedies are exhausted. *Id* at 233. " *See also, Booth v. Churner*, 532 U.S. 731, 121 S. Ct. 1819 (2001)(exhaustion of administrative remedies is required even if the administrative remedy will not provide the relief sought by the claimant). Appellant was required to have exhausted his available administrative remedies before seeking judicial review and his failure to have done so deprives the court of subject matter jurisdiction. *Barnes v. International Amateur Athletic Federation*, 862 F.Supp. 1537 (S.D.W.Va.,1993). In *McNeil v. United States*, 508 U.S. 106 (1993), the United States Supreme Court held that in the context of tort claims against the United States, administrative prerequisites to filing suit was jurisdictional. Similarly, this Court held that compliance with the pre-suit notification provisions is a jurisdictional pre-requisite for filing an action against a State agency. *Syl. Pt. 3, Motto v. CSX Transp., Inc.* 220 W.Va. 412, 647 S.E.2d 848 (2007). Here, if Appellant had exercised his right to an administrative remedy, and if he were successful in a due process hearing, the hearing examiner may have awarded compensatory

education and other services, thus satisfying the Legislative intent[14]. Appellant chose instead to ignore this prerequisite and seek monetary damages in circuit court.[15]

This Court has previously held,

> The general rule is that where an administrative remedy is provided by statute or by rules and regulations having the force and effect of law, relief must be sought from the administrative body, and such remedy must be exhausted before the courts will act.' Syl. pt. 1, *Daurelle v. Traders Federal Savings & Loan Association*, 143 W.Va. 674, 104 S.E.2d 320 (1958). Syl. pt. 1, *Cowie v. Roberts*, 173 W.Va. 64, 312 S.E.2d 35 (1984). Such an administrative hearing would give the applicant an opportunity to make a proper factual record to support our review of the Board's findings."

Weinstein v. West Virginia Bd. of Law Examiners, 183 W.Va. 158, 394 S.E.2d 757 (1990).

Courts repeatedly have observed exhaustion serves many useful functions by:

> (1) permitting the exercise of agency discretion and expertise on issues requiring these characteristics; (2) allowing the full development of technical issues and a factual record prior to court review; (3) preventing deliberate disregard and circumvention of agency procedures established by Congress; and (4) avoiding unnecessary judicial decision by giving the agency the first opportunity to correct any error.

Doe v. Alfred, 906 F.Supp. 1092, 1096-97. (S.D.W.Va. 1995)(citing *Association for Commun. Living v. Romer*, 992 F.2d 1040, 1044 (10th Cir.1993) (quoting *Hayes v. Unified Sch. Dist.*, 877 F.2d 809, 814 (10th Cir.1989)); *see Schlude v. Northeast Cent. Sch. Dist.*, 892 F.Supp. 560 (S.D.N.Y.1995) (quoting *Heldman v. Sobol*, 962 F.2d 148, 159 (2d Cir.1992))).

In this case, Appellant had due process rights during his entire educational career with

---

[14] As a part of his relief, the Appellant requests monetary damages to compensate him for the future cost of educational services.

[15] Appellant seeks monetary damages to compensate him for future education. Although monetary damages are not available under the remedies provided for pursuant to Policy 2419, a hearing examiner in a due process hearing could have awarded compensatory educational services and other services until age twenty-one, if he found an educational deficiency existed.

Kanawha County Schools, plus an additional two years after graduating in 2004. Appellant, however, did not utilize his administrative remedies, pursuant to Policy 2419. Administrative remedies are designed to create a record in order to permit a court to exercise jurisdiction over a case in controversy where the record has been fully developed and reviewed on appeal. By never exercising his due process rights under Policy 2419, Appellant caused several problems in requesting the trial court to bypass the purpose of Policy 2419. First, Appellant requested the trial court to analyze alleged educational deficiencies, while depriving the trial court of the benefit of a fully developed record from a hearing examiner who was qualified and specifically trained to analyze these particular issues. Second, Appellee was deprived the right to address alleged educational deficiencies. Finally, Appellant deprived this Court of the benefit of reviewing a fully developed record from the hearing examiner and the circuit court, had Appellant appealed the decision of the hearing examiner.

On appeal, Appellant argues, for the first time, that he is excused from exhausting his administrative remedies because such an exhaustion would be futile. The relief, however, available to Appellant through a due process hearing is similar to that which he requests in his Complaint. As more fully detailed in Section E below, exhaustion of administrative remedies pursuant to the IDEA and Policy 2419 was not futile because if Appellant prevailed in a due process hearing, he would have been entitled to additional compensatory educational services or other services. Thus, the trial court and this Court lack subject matter jurisdiction over this matter because Appellant failed to exhaust his administrative remedies, pursuant to Policy 2419.

(2) Appellant's request for relief is barred by laches.

As this Court has noted, the doctrine of laches may raise a bar to relief when administrative

remedies are not exhausted and the delay in requesting the administrative hearing results in a hearing being futile. *American Federation of State, County and Municipal Employees v. Civil Service Commission*, 181 W.Va. 8, 380 S.E.2d 43 (1989)("As to those employees who have filed no grievance, we note that the doctrine of laches may, in appropriate cases, raise a bar to relief. It is well -settled that, in the absence of a statute of limitations, laches will be applied in administrative cases.") *Id.* (quoting *Harris v. Civil Serv. Comm'n*, 154 W.Va. 705, 178 S.E.842 (1971). *See* 2 Am.Jur. 2d Administrative Law § 321 (1962)).

Appellant had a team of professionals who met at least every year to evaluate his Individualized Education Plan ("IEP"). During these meetings, the Plaintiff's present levels of performance were discussed and goals and objectives were developed. If Appellant or his parents disagreed with any of the IEPs, they had the right to file a due process hearing complaint, pursuant to Policy 2419. Similarly, if at any time Appellant or his parents thought that the IEP was not being followed, they had the right to file a due process hearing complaint, pursuant to Policy 2419. "Laches is a delay in the assertion of a known right which works to the disadvantage of another, or such delay as will warrant the presumption that the party has waived his right." ' Syllabus point 2, *Bank of Marlinton v. McLaughlin*, 123 W.Va. 608, 17 S.E.2d 213 (1941)." Syl. pt. 1, *State ex rel. Smith v. Abbot*, 187 W.Va. 261, 418 S.E.2d 575 (1992). *See also* syl. pt. 4, *Laurie v. Thomas*, 170 W.Va. 276, 294 S.E.2d 78 (1982). This Court noted:

> Where a party knows his rights or is cognizant of his interest in a particular subject-matter, but takes no steps to enforce the same until the condition of the other party has, in good faith, become so changed, that he cannot be restored to his former state if the right be then enforced, delay becomes inequitable, and operates as an estoppel against the assertion of the right. This disadvantage may come from death of parties, loss of evidence, change of title or condition of the subject-matter, intervention of equities, or other causes. When a court of equity sees negligence on one side and injury therefrom on the other, it is a ground for denial of relief.' Syllabus Point 3, *Carter v. Price*, 85 W.Va. 744, 102 S.E. 685 (1920); Syllabus Point

2, *Mundy v. Arcuri*, 165 W.Va. 128, 267 S.E.2d 454 (1980).

Syl. pt. 5, *Laurie v. Thomas*, 170 W.Va. 276, 294 S.E.2d 78 (1982). *See also,* syl. pt. *2,Hartley v. Ungvari*,173 W.Va. 583, 587, 318 S.E.2d 634, 638 (1984). The Appellant cannot bypass the administrative procedures mandated by Policy 2419 prior to filing his civil action, but is required to take advantage of the administrative remedies available to him, pursuant to Policy 2419. Thus, the circuit court's Order must be affirmed because Appellant's request for relief is barred by laches because Appellant sat on his rights to the detriment of others.

(3) Only after a due process hearing is held, may a party appeal the hearing examiner's decision by filing a civil action.

Policy 2419 prohibits a party from filing a civil action prior to exhausting its specific administrative procedures. First, a party must first file a due process complaint. §126 C.S.R. 16-11(3)(A). After a specially educated, trained and experienced hearing examiner conducts an impartial hearing, a decision is issued. §126 C.S.R. 16-11(3)(M). Unless a party challenges the decision through civil action, the decision is final. *Id.* If a civil action is filed appealing the hearing examiner's decision, the court is able to review the fully developed administrative proceeding records, hear additional evidence, and grant appropriate relief. §126 C.S.R. 16-11(3)(N). A party is not permitted to bypass the administrative remedies provided by Policy 2419.

In this case, Appellant was required to exhaust his administrative remedies pursuant to Policy 2419 by first filing a due process complaint. Only after a hearing examiner issued a decision, was Appellant permitted to file a civil action. Thus, the circuit court properly granted the Appellee's Renewed Motion to Dismiss because Appellant failed to exhaust the administrative remedied according to West Virginia law and therefore, could not file a civil action alleging deficiencies in his education provided to him by the Kanawha County School Board.

E. The Circuit Court did not err in finding that the Appellant had failed to exhaust his administrative remedies because Appellant failed to plead in his Complaint that exhaustion was futile.

The circuit court did not need to look beyond the face of the Complaint to grant the Motion to Dismiss because the allegations in the Complaint reveal that Appellant did not even attempt to exercise his administrative remedies. Essential material facts must appear on the face of the complaint. *Fass v. Nowsco Well Service, Ltd.*, 177 W.Va. 50, 350 S.E.2d 562 (1986). The complaint must set forth enough information to outline the elements of a claim or permit inferences to be drawn that these elements exist. *Id.* (citing *Jenkins v. McKeithen*, 395 U.S. 411, 423-24, 89 S.Ct. 1843, 1849-50, 23 L.Ed.2d 404, 417-18 (1969) and W.Va.R.Civ.P. 8(a)).

Appellant also alleges that exhaustion was futile. Appellee acknowledges that this Court recognizes the futility exception to the exhaustion requirement. *See* Syl. Pt. 2, *Kincell v. Superintendent of Marion County Schools*, 201 W.Va. 640, 499 S.E.2d 862 (1997)(citing Syl. Pt. 1, *State ex rel. Bd. of Educ. v. Casey*, 176 W.Va. 733, 349 S.E.2d 436, 437 (1986) and Syl. Pt. 2, *Beine v. Board of Education*, 181 W.Va. 669, 383 S.E.2d 851 (1989)). Exhaustion, however, would not have been futile. Appellant and his parents had almost eighteen years to file a due process complaint regarding alleged education deficiencies. Moreover, Appellant had two years after graduation to file a due process complaint. Appellant never alleged in his Complaint that exhaustion was futile because neither the Appellant nor his parents never attempted to file a due process complaint. Neither the Appellant nor his parents even alerted the Appellee that either were displeased with Appellant's expected graduation. Appellant or his parents could have made a due process complaint at any time. Specifically, the Appellant or his parents could have filed a due process complaint after any one of Appellant's IEP meetings or after any one of the numerous manifestation hearings. Any argument that Appellant or his parents lacked knowledge of

Appellant's upcoming and anticipated graduation is absurd.[16]

Appellant relies on *Ronnie Lee S. v. Mingo County Board of Education*, 201 W.Va. 667, 500 S.E.2d 292 (1997) for the proposition that there are exceptions to the requirement to exhaust administrative remedies, including when exhausting remedies would be inadequate or futile. However, there is some very important distinctions with regard to *Ronnie Lee S.* and the case at hand. First, the plaintiff in *Ronnie Lee S.* filed a request for a due process hearing. *Id* at 294, 669. The parties reached a settlement, and this Court concluded that this settlement satisfied the exhaustion requirement. *Id* at 295, 670. Next, in *Ronnie Lee S.*, the parents were seeking monetary damages and injunctive relief from the county board of education for "personal and bodily injuries" from the use of a device to strap the child to a chair while attending school. *Id* at 294, 669. The issue was not whether the child was entitled to FAPE, but for personal injuries sustained. *Id.* In this case, Appellant is not seeking recovery for "personal or bodily injuries" but compensatory damages as a result of an alleged inadequate education under Policy 2419. Thus, *Ronnie Lee S.* is not applicable to this case.

Furthermore, Appellant's allegation that the trial court erred in finding that exhaustion of administrative remedies was dispositive as to Appellant's remaining state law claims. Appellant having made a new argument not alleged in the complaint. Allegations not within Appellant's Complaint should not be considered as true in determining whether the trial court erred in granting

---

[16] While the Appellee is loath to get into facts outside of the record itself, the Appellee must refute false allegations made by Appellant's Brief. The signed IEPs clearly reveal that Appellant's educational program was leading towards a standard diploma. During Appellant's last IEP meeting on December 15, 2003, prior to graduating in June 2004, Appellant's IEP specifically identified how many credits that Appellant needed in order to graduate. In fact, Appellant and his parents were adamant in completing the requirements to obtain his high school diploma. This same IEP notes comments from Appellant stating that he planned on doing his work to finish out school and his father stating that Appellant "will earn his high school diploma one way or the other."

the motion to dismiss. *See Fass v. Nowsco Well Services, Ltd.*, 350 S.E.2d 562, 564 (1986). Moreover, Appellant's allegation that his administrative remedies were foreclosed when he was permitted to graduate and thus administrative remedies would be futile was not alleged in his Complaint.

Furthermore, Appellant never made these argument to the Federal Court in response to Appellee's Motion to Dismissed filed there. The body of federal law recognizes that there are times when administrative remedies is sometimes futile. *Doe v. Alfred*, 906 F.Supp. 1092, 1097 (1995). Why didn't Appellant raise a similar argument in Federal Court? Moreover, the Appellant has the burden of proving that exhaustion futile, in order to avoid the exhaustion requirement. *Id.* Appellant cannot meet his burden. Appellant only alleged that exhausting administrative remedies would have been futile on March 12, 2007, in Response to the Renewed Motion to Dismiss filed on January 5, 2007. Appellant knew the validity of the Appellee's motion to dismiss based on the failure to exhaust when the Federal Court dismissed all of Appellant's federal claims. Appellant never moved the trial court to amend his Complaint to further allege that exhaustion of administrative remedies would be futile or that none existed. Instead, Appellant waited almost a year before alleging that if discovery were permitted, that the evidence would reveal that exhaustion was futile and that no administrative remedies existed. This argument is solely a device to overcome Appellee's entitlement to dismissal, because of the Appellant's failure to exhaust his administrative remedies.

Appellant's futility argument should not even be considered because Appellant's Complaint did not allege in his Complaint that exhaustion of administrative remedies was futile. The Court is not obligated to accept as being true any allegations or legal conclusions contained in Appellant's brief which go beyond the allegations contained in his Complaint. See *Collins v. Red Roof Inns, Inc.*, 248 F.Supp.2d 512, 515-516 (S.D.W.Va. 2003). In fact, the Complaint does not allege

administrative remedies were inadequate or that the Appellee violated due process rights afforded to Appellant, or that Appellant or his parents were ignorant as to the their rights under the IDEA or Policy 2419. Finally, Appellant never alleged that he or his parents even attempted to file a due process complaint, initiate any due process hearings or that they complained to the Appellee about the education that Appellant was receiving.[17]

This Court should not accept new allegations that exhaustion was futile because Appellant's allegations are wrong as a matter of law according to Policy 2419. The circuit court did not err in dismiss the remaining state law claims because the circuit court could only rely on the allegations within the Appellant's Complaint. The bottom line is that neither Appellant nor his parents made any attempt to utilize or exhaust any of the available administrative remedies under Policy 2419. Appellant is simply attempting to avoid the mandatory requirements of Policy 2419. This Court has consistently required that relief first be sought and exhausted from available administrative remedies. Due to the fact that an administrative remedy was available and Appellant failed to exhaust it, the trial court properly dismissed the remaining state law claims, as a matter of law.

If Appellant truly believed that exhaustion was futile, he would have alleged it in his Complaint or requested leave to amend his Complaint under Rule 15, or made a motion under Rule 59(e) or 60(b). Appellant's new argument must be dismissed as inaccurate and misleading. It cannot serve as a basis for overturning the trial court's dismissal of the remaining state law claims. Judge

---

[17] In 2003, Appellant and his parents attended three out of the four IEP meetings. The only IEP meeting in which Appellant and his parents did not attend was one in which they advised Appellee that they did not wish to attend. The IEPs reveal that Appellant's parents were very active in Appellant's education, were fully aware of Appellant's progress, and even signed the IEPs. The IEPs further detailed the status of Appellant's educational goals, reported Appellant's absenteeism which frequently verged on excessive, and noted Appellant's difficulty with reading and writing skills. During eleventh grade, Appellant missed thirty days. During his first semester of his Twelfth grade year, he had missed forty two days. Appellant has not alleged that his learning disability caused him to miss school. Appellee has repeatedly advised Appellant's parents that attendance was directly related to Appellant's grades and learning.

Kaufman properly granted the Renewed Motion to Dismiss as a matter of law based on the allegations within the Complaint.

F. The Appellee's Motion to Dismiss was not converted into a Motion for Summary Judgment.

Appellant argues that the circuit court erred in considering matters outside the pleadings, specifically conclusory findings of the Federal Court. Appellant's only basis for this argument was that Judge Kaufman cited the Federal Court's conclusory findings within the Order. This argument is flawed because Judge Kaufman is entitled to cite procedural facts. Paragraphs 2 and 3 of the Findings of Fact set forth only procedural facts, not disputed facts with regard to the Appellant's educational services provided by the Kanawha County Schools. Appellee is confused as to precisely what Appellant alleges Judge Kaufman did wrong. "An appellant must carry the burden of showing error in the judgment of which he complains." Syl. pt. 2, *West Virginia Department of Health & Human Resources Employees Federal Credit Union v. Tennant*, 599 S.E.2d 810 (2004). Even if Judge Kaufman had relied on the conclusory findings of the Federal Court, he had the authority to take judicial notice of procedural facts of the Federal Courts Order without converting the Renewed Motion to Dismiss to a Motion for Summary Judgment because Appellant did not dispute the factual accuracy of the Federal Court dismissing all federal claims. *See Gulas v. Infocision Management Corp.*, 215 W.Va. 225, 599 S.E.2d 648 (2004)(citing *Andrews v. Daw*, 201 F.3d 521 (4th Cir.2000)).

Typically, "[o]nce the court decides to accept matters outside the pleading, it must convert the motion to dismiss into one for summary judgment." *Chapman v. Kane Transfer Co., Inc.*, 160 W.Va. 530, 236 S.E.2d 207 (1977)(citing *Phillips v. Columbia Gas of West Virginia*, 347 F.Supp. 533 (S.D.W.Va.1972), *affirmed* 4th Cir., 474 F.2d 1342; *Smith v. Blackledge*, 451 F.2d 1201 (4th Cir. 1971)). While Judge Kaufman noted certain procedural facts including the fact that the Federal

Court dismissed all federal claims because of Appellant's failure to exhaust his administrative remedies, there is no basis for alleging that Judge Kaufman reviewed any other facts. As this Court has consistently held, "a court speaks only through its orders."*Davis v. Mound View Health Care, Inc.*, 220 W.Va. 28, 32, 640 S.E.2d 91, 95 (2006)(quoting *State ex rel. Kaufman v. Zakaib* , 207 W.Va. 662, 671, 535 S.E.2d 727, 736 (2000)). If Judge Kaufman had relied upon the federal court order in dismissing this action, he would have noted it in his order. Additionally, if this Court finds that the circuit court lacked subject matter jurisdiction over the Appellant's claims, then even if the circuit court relied on the federal court order, it would not convert the motion to dismiss to one for summary judgment. *See Elmore v. Triad Hospitals, Inc.*, 220 W.Va. 154, 640 S.E.2d 217 (2006).

Thus, the Appellee's motion to dismiss was not converted to a motion for summary judgment. Even if the trial court had taken judicial notice of the Federal Court's findings, or if this Court finds the circuit court lacked subject matter jurisdiction, then the motion could not have been converted to one for summary judgment. Once again, Appellant's argument must fail as a matter of law.

G. The Circuit Court did not err in granting Appellee's Renewed Motion to Dismiss because a motion to dismiss does not analyze whether there are genuine issues of material fact or whether discovery had been obtained by either party.

The circuit court properly dismissed Appellant's remaining state law claims for failure to exhaust his administrative remedies prior to filing this suit. Appellant mistakenly refers to genuine issues of material fact. In deciding the motion to dismiss, Judge Kaufman properly assessed the allegations within the Complaint, as he could not rule on facts not plead within the Complaint. This was not a motion for summary judgment, nor was it converted into a motion for summary judgment. Conducting discovery is irrelevant to the analysis of whether a party availed himself of available administrative remedies because Appellant failed to allege that he was exempt from exhausting the

administrative remedies under the IDEA and Policy 2419 either that administrative remedies were not available or that efforts would be futile. A motion to dismiss is a motion to test whether Appellant stated a claim in his Complaint and discovery is not needed to determine whether Appellant sufficiently plead a cause of action. See *Fass v. Nowsco Well Service, Ltd.*, 177 W.Va. 50, 350 S.E.2d 562 (1986).

Appellant's allegation that he did not have sufficient time to conduct discovery prior to Judge Kaufman granting the motion to dismiss is also inaccurate because no amount of discovery would overcome the fact that he failed to exhaust available administrative remedies under Policy 2419. When the case was remanded back to the Circuit Court on June 1, 2006, a Scheduling Order was entered providing that discovery was to be completed by June 29, 2007, and trial was to begin on August 27, 2007. The parties had disclosed fact witnesses in October 2006, and the defendant disclosed its expert witnesses on January 5, 2007. Despite being provided this information, Appellant never propounded any formal discovery requests and never made a single request for a deposition in the ten months between the Federal Court remanding the case and Judge Kaufman granting the Motion to Dismiss on April 3, 2007. Appellant wants this Court to believe that had the trial court not dismissed his Complaint, that he would have begun and completed extensive discovery in less than three months, after not conducting one ounce of discovery in the preceding ten months. Regardless, the trial court was not required to permit Appellant an opportunity to conduct discovery prior to granting the Motion to Dismiss because it must be assumed that the trial court properly granted the Motion to Dismiss unless Appellant can prove otherwise. No amount of discovery can overcome Appellant's failure to exhaust his administrative remedies available to him. Thus, this argument is a red herring and should not be considered.

V. CONCLUSION

In analyzing the issues for this appeal, several facts are clear. First, administrative remedies were available to Appellant pursuant to the IDEA and Policy 2419, but Appellant failed to avail himself of these administrative remedies and thus failed to exhaust them prior to filing this suit. Second, efforts to exhaust would not have been futile because administrative remedies were available to him both prior to and following graduation and, had he been successful, the hearing officer could have ordered appropriate compensatory education and services. Third, after the federal claims were dismissed, there were no remaining state law claims left to analyze under the *West Virginia Human Rights Act* and *West Virginia Code* §18-1-4. Fourth, any new allegations not within the Complaint cannot be considered and is solely an attempt to overcome Appellant's failure to exhaust administrative remedies. Fifth, it must be assumed that Judge Kaufman accessed only the allegations in the Complaint, as reflected the Order because a court only speaks through its orders. If, however, Judge Kaufman relied on the Federal Court's findings, he had the authority to take judicial notice of facts within the Federal Court's Order. Further, if this Court finds that the circuit court lacked subject matter jurisdiction based on the Appellant's failure to exhaust administrative remedies, then the motion to dismiss could not have been converted to a motion for summary judgment and dismissal remained appropriate. Finally, no amount of discovery would change the fact that Appellant failed to exhaust his administrative remedies. Thus, this Court should affirm Judge Kaufman's Order granting the Appellee's Renewed Motion to Dismiss as to Appellant's remaining state law claims.

KANAWHA COUNTY BOARD OF EDUCATION,

By Counsel,

Charles R. Bailey, Esquire (WV Bar No. 0202)
Vaughn T. Sizemore (WV Bar No. 8231)
Kelly C. Morgan, Esquire (WV Bar No. 9519)
BAILEY & WYANT, P.L.L.C.
500 Virginia Street, East, Suite 600
Post Office Box 3710
Charleston, West Virginia 25337-3710

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

THOMAS STURM,

Appellant,

v. **Supreme Court No. 33854**

KANAWHA COUNTY BOARD OF EDUCATION,

Appellee.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that the foregoing **"APPELLEE'S BRIEF"** has been served upon the following counsel of record by this day mailing true copies thereof:

Michael T. Clifford, Esquire
Attorney at Law
723 Kanawha Boulevard East
Charleston, West Virginia 25301
Counsel for Appellant

Done this 19th day of May, 2008.

Charles R. Bailey, Esquire (WV Bar No. 0202)
Vaughn T. Sizemore (WV Bar No. 8231)
Kelly C. Morgan, Esquire (WV Bar No. 9519)
BAILEY & WYANT, P.L.L.C.
500 Virginia Street, East, Suite 600
Post Office Box 3710
Charleston, West Virginia 25337-3710
(304) 345-4222
Counsel for Kanawha County Board of Education